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No. 74-1044

In The Supreme Court of The United States

OCTOBER TERM, 1974

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

Appellants,

v.

ROBERT D. MURGIA,

Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 72-2083-LC — CIVIL ACTION

ROBERT D. MURGIA,
Plaintiff

v.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT
Defendant

MEMORANDUM AND ORDER

CAMPBELL, D. J.

I

Plaintiff is the executive officer and lieutenant colonel of the Uniformed Branch of the Massachusetts State Police, with over 24 years service in that branch. On July 23, 1972, when he reaches the age of 50, he will be retired from the state police, pursuant to M.G.L. ch. 32, sec. 26(3)(a), which requires that the state board of retirement retire members

of the Uniformed Branch when they reach 50 or complete 20 years service, whichever occurs later.

Plaintiff brings this action, asserting jurisdiction under 28 U.S.C. § 1343(3), to enjoin the execution of ch. 32, § 26 (3)(a). He alleges that the statute discriminates against him in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Plaintiff claims that he is denied equal protection of a right to employment, in at least three ways:

> "(a) Men have been employed by the State Police, taken a leave of absence of many years, and returned to the force and continued their employment up to age 65 because they have not completed their 20 years service.
>
> (b) Detectives in the State Police who perform similar functions as the uniformed branch are permitted to continue in their employment under General Laws, Chapter 26(3) to the age of 65.
>
> (c) Women in the State Police by virtue of an exception in General Laws, Chapter 22, Section 9A are permitted to continue their employment beyond the age of 50." Complaint ¶ 7.

The immediate questions before this Court are whether or not to convene a three-judge court pursuant to 28 U.S.C. Secs. 2281 and 2284, and issue a preliminary injunction restraining plaintiff's forced retirement pending final determination of the case. A hearing addressed to these questions was held on July 18, 1972. There, in addition to the

arguments of counsel, the Court heard plaintiff present case-history examples and other evidence to illustrate the alleged discriminations described above. The Court also allowed a brief *amicus* statement to be made, opposing plaintiff's contentions, by counsel for the State Police Association of Masachusetts.

II

A three-judge court is not required to be convened if the constitutional question raised is insubstantial. *Ex Parte Poresky,* 290 U.S. 30 (1933). There the Court said:

> "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint . . . . The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy'." 290 U.S. at 32.

More recently, the Supreme Court has reiterated that the question of substantiality is for the single judge to decide:

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." *Idelwild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S.

713, 715 (1962). See also *Bailey* v. *Patterson*, 369 U.S. 31 (1962), *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965).

In deciding whether or not the constitutional question presented here is substantial, this Court feels that it should be guided by the following language of the Second Circuit Court of Appeals:

> "The easiest solution for the district judge, whenever the words 'United States Constitution' or 'Fourteenth Amendment' appear in a complaint, would be to relieve himself of two-thirds of the responsibility for the decision by requesting the convening of a three-judge court . . . [But a] district judge should not feel that he is merely a rubber stamp or that he exercise his judgment at his peril . . . [A]lthough this case may not be 'open and shut' (so few cases are), the decisions of the Supreme Court and other courts which are as analogous as possible to this case should be examined to ascertain whether they 'foreclose the subject' . . . Of course, no two cases involving equal protection are alike as to facts and, were mere factual variation the test, all cases should be channeled to the Supreme Court on the chance that some distinguishing feature might be found. However, the Supreme Court reminds us that '[t]he Three-judge requirement is a technical one to be narrowly construed. *Phillips* v. *United States*, 312 U.S. 246, 251 . . . .' " *Johnson* v. *New York State Education Department*, 449 F.2d 871, 875-6 (2nd Cir. 1971). Compare *Jackson* v. *Choate*, 404 F.2d 910, 913 (5th Cir. 1968).

III

Upon examination of analogous Supreme Court and lower court cases, I conclude that plaintiff's federal constitutional claim is without merit.

This is not a case where a plaintiff is alleging discrimination based upon a suspect classification such as religion or race, or deprivation of some fundamental right such as the right to vote. Statutory classifications of such a nature are subject to special scrutiny by the courts. *Brown* v. *Board of Education*, 347 U.S. 483 (1954), *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966).

The plaintiff has pointed to no case bringing the right sought to be protected here, the right to continued employment beyond a specified age or period of service, within the area where only a compelling interest allows the state to maintain the challenged classification. Indeed, one case plaintff relies on did not even consider the constitutional question, *Allen* v. *Borough of West Mifflin*, 419 Pa. 394, 214 A. 2nd 502 (1965), and the other held *against* the officers complaining of forced retirement, *Boyle* v. *City of Philadelphia*, 338 Pa. 129, 12 A. 2d 43 (1940).

Absent any allegations touching off strict scrutiny of the challenged classification, the task before the court is to determine whether the "classification bear[s] some rational relationship to a legitimate state purpose." *Weber* v. *Aetna Casualty & Surety Company*, Supreme Court Slip Opinion, April 24, 1972, at 8, and cases cited therein.

The Supreme Court has applied this test where classifications depriving persons of employment opportunities are

challenged. *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947), *Goesaert* v. *Cleary*, 335 U.S. 464 (1948).

According to counsel for the Commonwealth, the purpose of the challenged statute is to insure that the Uniformed Branch of the state police be a "young, vigorous force." Early retirement even of high-ranking officers gives younger men a chance for promotion and ensures that commanders possess the physical vigor to accompany their men in the field. These are surely legitimate purposes. Mandatory retirement at the age of 50 is at least a rational, if not the only, means of achieving them.

True, the statute provides that a state policeman may not be retired until he has reached 20 years' service if that should occur after he has reached 50. The Commonwealth explains that this provision merely tempers the age-50 requirement in the interest of having a policeman serve long enough to merit a pension.

Under usual circumstances, a man will be forced to retire at age 50 in any event, since he may enlist in the state police for the first time only between the ages of 21 and 29. M.G.L. ch. 22, § 9a, effective Dec. 1, 1939. But it has happened, for various reasons, that some members have exceeded or will exceed age 50 when they retire. Thus, before the effective date of § 9a, some men over 29 enlisted. Others, by special statutory dispensation, were allowed to enlist after they had reached 30 if they had served in the armed forces during World War II. Ch. 22, § 9a, as amended by the Acts of 1946, ch. 260.

A notarized letter by the Commissioner of Public Safety, made an appendix to this opinion, shows that most uniformed policemen over 50 at retirement are in the above two categories. The case histories produced by the plaintiff's own search do not contradict this conclusion.

Finally, in some instances, members have left and then returned to the service, and hence are over 50 before putting in 20 years total service. But as the Commissioner's notarized letter makes clear, relatively few men are in this category: Only two men presently in the service, and two men who have retired.

Only to the limited extent illustrated by the examples given above is the principal statutory purpose thwarted. The Commissioner states that since 1921 only 35 out of 2,061 individuals enlisted in the Uniformed Branch served over the age of 50.

As for the differences between the treatment of the plaintiff and the treatment of detectives and women, it is surely rational to differentiate between those whose jobs require primarily patrolling, and crime prevention and control, and those whose duties require less athletic and physically demanding work. Detectives, whose primary task is investigation, and women, whose primary task is dealing with women and children, could rationally be determined by the legislature to fall within this latter category.

That detectives and women sometimes perform physically taxing work does not, because it produces a minor inconsistency in the statutory scheme, make the statute constitutionally invalid.

It is also true that uniformed members assigned to the detective branch, or to other offices where physically demanding work is not required, are still forced to retire at 50.

This and other inconsistencies in the statutory scheme may be imperfections. But, as the Supreme Court has said:

> "In the area of economics and social welfare, a State does not violate the Equal Protcetion Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality' . . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific' . . . . 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' " *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970). See also *Briggs* v. *Kerrigan,* 431 F.2d. 967, 968-9 (1st Cir. 1970).

Plaintiff's prayers for a temporary restraining order and for the convening of a three-judge court are denied. As the complaint does not raise a substantial constitutional question, and as it is essential to jurisdiction that a substantial constitutional question be raised, the complaint is dismissed. *Ex Parte Poresky,* 290 U.S. 30 (1933), *Rosado* v. *Wyman,* 397 U.S. 397 (1970).

/s/ LEVIN H. CAMPBELL
United States District Judge

Date: July 21, 1972

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 72-2083-LC — CIVIL ACTION

ROBERT D. MURGIA,

vs.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT

JUDGMENT

July 26, 1972

CAMPBELL, District Judge,

After hearing, and in accordance with the Memorandum and Order of the Court entered July 21, 1972, it is hereby ORDERED

Judgment for the defendant;

complaint dismissed.

By the Court,
/s/ SUSAN A. TEBO
Deputy Clerk

/s/ LEVIN H. CAMPBELL
United States District Judge

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1300

ROBERT D. MURGIA,
Plaintiff, Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,
BOARD OF RETIREMENT,
Defendant, Appellee.

Before COFFIN, *Chief Judge*
MCENTEE, *Circuit Judge,*
and KILKENNY, *Senior Circuit Judge.*

[SEAL]
U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT
Filed in Clerk's Office
Sep 10 1973

MEMORANDUM AND ORDER

Entered: September 10, 1973

The court, mindful of the strictures of *Goosby* v. *Osser,* 409 U.S. 512 (1972) and of the ambiguities in *Frontiero* v. *Richardson* ... U.S. ... (May 14, 1973), both decided subsequently to the decisions below, is unable to say that the claims presented afford "no room" for controversy. It is ordered that the judgment be set aside and the case is remanded for the impanelling of a three-judge court. No costs.

By the Court:
/s/ DANA H. GALLUP
Clerk.

Enter: COFFIN, Ch. J.
[cc: Messrs. City and O'Malley.]

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 72-2083-T CIVIL ACTION

ROBERT D. MURGIA,
Plaintiff,

v.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT et al.,
Defendants.

OPINION

Before ALDRICH, *Senior Circuit Judge,*
FREEDMAN and TAURO, *District Judges.*

May 31, 1974

ALDRICH, *Senior Circuit Judge.* Plaintiff, Robert D. Murgia, brings this three-judge district court action to declare unconstitutional, and to obtain injunctive relief against the enforcement of, Mass. G.L. c. 32 § 26(3). Pursuant to that statute plaintiff, a Lt. Colonel in the Uniformed Branch of the Massachusetts State Police, was involuntarily retired because, having completed over 20 years of service, he had reached age 50. He alleges that mandatory retirement at that age is a violation of his civil rights of due process and equal protection. He also alleges sex discrimination because under the law, although apparently not now in practice, women police officers may enlist after age 30, and thus auto-

matically may serve beyond age 50.[1] We reach only one issue, that a classification based on age 50 alone lacks a rational basis in furthering any substantial state interest.

Until age 40 every officer is given a comprehensive physical examination every two years, and after age 40, every year. Failure to pass results in disability retirement unless the particular physical defect is waived by the Commissioner of Public Safety.[2] Plaintiff's standing is self-evident; the testimony is undisputed that at the time of his discharge he was in excellent physical health and capable of performing the duties of a state police officer, whether involving physical or psychological stress. At the same time, it is acknowledged that service in this branch is, or can be, arduous,[3] and that high versatility is required, with few, if any, backwaters available for the partially superannuated. Lest there be misunderstanding, we do not fault the service in this respect; the state is entitled to maintain rigorous job requirements; nor do we understand plaintiff to contend otherwise.

Our first question could be the standard to apply in test-

[1] Had plaintiff not served 20 years, he could have remained on the force until he did so. However, since under the law no male may enlist after age 30, this extension can presently occur only for certain individuals who have resigned, or taken a leave of absence, and rejoined at some later date. On the record this is an unusual occurrence, and we will assume the existence of legitimate grounds for the exception. Nor will we concern ourselves with the technical sex discrimination.

[2] Senior officer of the Uniformed Branch, and head of the Department of Public Safety, of which the State Police is a division.

[3] We assume, at least for present purposes, that the duties are sufficiently more arduous than, or the physical and mental stresses significantly different from, those of detectives or policemen in other branches and at other levels of government, so that there is no viable unequal protection claim in this area.

ing the constitutionality of the statute; whether, because plaintiff's right to employment may be a fundamental interest or because age might be a suspect classification, the burden is on the state to show a compelling interest, or whether, on the other hand, the burden is on the plaintiff to show a lack of rational basis. However, since we find that plaintiff has succeeded in this last, we need not proceed further. We hold that plaintiff has at least a recognizable interest in retaining his employment[4] which the state cannot deny arbitrarily and irrationally, *Drown* v. *Portsmouth School District*, 1 Cir., 1971, 451 F.2d 1106, 1108; *see Board of Regents* v. *Roth*, 1972, 408 U.S. 564, 576-77; *Wieman* v. *Updegraff*, 1952, 344 U.S. 183, 192, and we find that mandatory retirement of officers at 50 years of age bears no "fair and substantial relation to the object of the legislation," *F. S. Royster Guano Co.* v. *Virginia*, 1920, 253 U.S. 412, 415, quoted in *Reed* v. *Reed*, 1971, 404 U.S. 71, 76.

We dispose readily of certain of the state's contentions. Its argument that early retirement enhances the morale of the younger members, in a sense assumes the point. Of course, if there are only younger members, they are happier than the older members who are being eliminated. This does not add up on balance, but merely advances the time of ultimate unhappiness.[5] The same can be said with respect to the alleged desirability of rapid promotion; the attractiveness of quick promotion must be weighed against the unattractiveness of early retirement. Furthermore, to

[4] To the extent that it may affect plaintiff's due process rights, *see Board of Regents* v. *Roth*, 1972, 408 U.S. 564, we note that after six years of service no officer who passes the physical can be denied reenlistment. Mass. G.L. c. 22, § 9A.

[5] We would concede vitality to the morale argument if officers not capable of carrying their full load were to be retained, but this is not the question. *See* ante.

the extent that the purpose of early retirement is said to be to empty higher ranking positions after they have been occupied by one person for a reasonable time, the cut-off at 50 years is of questionable consequence since it is unrelated to the period of time the retiree has occupied his last position.[6] The alleged desirability of facilitating rapid promotion by early retirement, rather than a justification, will be seen on analysis to be age discrimination per se.

The only question requiring serious consideration is whether mandatory retirement at age 50 is rationally related to maintaining a vigorous, healthy personnel. Even plaintiff's experts concede that there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job. On the other hand, the state does not dispute their testimony that the relation between chronological age and functional age varies greatly from one individual to the next. Its response is that in matters of this sort it is administratively reasonable to select an arbitrary cut-off, and that irrationality is not established by the fact that certain individuals are disadvantaged thereby. *Cf. Wickard* v. *Filburn,* 1942, 317 U.S. 111, 129-30.

We fully accept the necessity of choosing arbitrary standards in certain, and indeed in many, situations. For example, in dealing with the immeasurable changes relating to the onset of maturity, legislatures may require a specific age for voting, *Oregon* v. *Mitchell,* 1970, 400 U.S. 112, even though the particular age selected may seem indifferentiable from other ages in proximity to it. *Id.* at 294 (Stewart, J., concurring in part and dissenting in part); *see id.* at 243-46 (Brennan, White and Marshall, JJ., concurring in part and

[6] An officer qualifying for promotion, or for further promotion, is not required to accept it.

dissenting in part). *See also, e.g., United States* v. *Duncan,* 9 Cir., 1972, 456 F.2d 1401, 1405 (minimum age for jury service), *vacated on other grounds,* 409 U.S. 814; *Smith* v. *United States,* 9 Cir., 1970, 424 F.2d 267 (selective service age limitations); *Scarangella* v. *Commissioner,* 3 Cir., 1969, 418 F.2d 228 (classification of tax exemptions by age of dependent). But to say that a line may be drawn arbitrarily when there is no readily discernible breaking, or turning, point, does not mean that the line can be drawn anywhere at all. To satisfy minimal standards of rationality the line must be drawn within a range where fairness, or some appreciable state interest, exists, even if no specific point within that range is preferable to any other.

In the voting and other cases above cited, the legislature was concerned with a broad spectrum of the population where it would not be practicable to make individual determinations. Under such circumstances an arbitrary standard is called for, if not inevitable, and the only question must be whether the one selected is, in the large, reasonable. In the case at bar the situation is exactly the reverse. Individual testing is not impracticable but, rather, is already the order of the day. There is no suggestion that it is more burdensome to examine an officer at age 50 than it was at age 49. We must look, therefore, in another direction for reasonableness — is there, for example, a greater risk at the higher age that the test, or, more exactly, the prognosis based upon testing, will be less reliable?

In this connection we note the case of *Air Line Pilots Ass'n, Int'l* v. *Quesada,* 2 Cir., 1960, 276 F.2d 892, *cert. denied,* 366 U.S. 962, upholding as not "arbitrary and discriminatory and without relation to any requirement of safety" an administrative ruling disqualifying pilots from

active duty upon reaching age 60. In so doing the court pointed out the comprehensive study conducted by the administrator, and the documented reasons for his conclusion that by age 60, in spite of medical testing, a critical area had been reached. *See* 276 F.2d at 898. No such determination has been, or could be made, in the case at bar. So far as appears, no study has been conducted of any kind. While there has been a compilation of certain statistics, from defendants' standpoint they are counter-productive. Not only did no expert testify to any significance in age 50 in a group which, by hypothesis, had individually passed annual tests during the preceding decade, but statistics of actual experience forecast no imminent change. In the Uniformed Branch during the period November 1967 to December 1973 there were fifteen discharges of persons between the ages of 40 and 50 for non-injury disability, divided as follows.

Age 40-3	Age 45-1
41-3	46-3
42-1	47-2
43-1	48-1
44-0	49-0
—	—
8	7

The force of these figures is not offset by a growth curve of waivers in the place of disability retirements.[7] The sta-

[7] Thus in the year 1973, ten waivers of partial, although permanent, non-injury disability were granted in the 40-50 age group. These divided as follows:

Age 40-0	Age 45-2
41-2	46-0
42-1	47-0
43-1	48-2
44-2	49-0
—	—
6	4

tistics furnish no reason to suppose that age 50 is within, or even significantly approaching, a range where changes of conditions warrant a change of treatment. Rather, they contradict it.

If, further, we turn from Massachusetts to national experience as disclosed by legislative response, plaintiff has furnished a list of statutes from which it appears that Massachusetts is the only state compulsorily retiring police officers before age 55.

On this record we find that mandatory retirement at age 50, where individualized medical screening is not only available but already required, is no more rational, and no more related to a protectable state interest, than the mandatory suspension or discharge of school teachers upon reaching their fourth or fifth month of pregnancy.[8] *Cleveland Board of Education* v. *LaFleur*, (1/21/74) .... U.S. ..... Recognizing the public interest in protecting individuals' right to work, and against discrimination on account of age, *see, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621; Mass. G.L. c. 149, §§ 24A and 151B, we are compelled to strike down the present age distinction where plaintiff has established the absence of any factual basis therefor.[9]

[8] We do not regard *Thomas* v. *Pate*, 7 Cir., 1974, 493 F.2d 151 (prisoners under 40 denied free long underwear) as in any way contra. We read that case, *inter alia*, as one where plaintiff failed to make allegations specific enough to raise an issue of irrationality.

[9] Whether we would reach the same result if the statute selected a more customary retirement age is not before us. With great respect to Mr. Justice Rehnquist, dissenting in *Cleveland Board of Education* v. *LaFleur*, ante, we would anticipate the question of mandatory retirement at age 70 not to be the same as at age 50, but perhaps we say this because of the increasing difficulties that a plaintiff might have to show that at that greater age the state had not made out a factually rational argument.

Judgment will be entered declaring Mass. G.L. c. 32 § 26 (3) unconstitutional and void, and awarding, after hearing, appropriate mandatory relief.

/s/ BAILEY ALDRICH
U.S. Senior Circuit Judge
/s/ FRANK H. FREEDMAN
U.S. District Judge
/s/ JOSEPH L. TAURO
U.S. District Judge

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 72-2083-T — CIVIL ACTION

ROBERT D. MURGIA,
Plaintiff,
v.
COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT et al.,
Defendants.

OPINION

December 12, 1974.

Before ALDRICH, *Senior Circuit Judge,*
TAURO and FREEDMAN, *District Judges.*

ALDRICH, *Senior Circuit Judge.* We are now concerned with the measure of relief to be afforded as a result of our decision in *Murgia* v. *Commonwealth of Massachusetts Board of Retirement,* D.Mass., 1974, 376 F.Supp. 753, holding unconstitutional Mass. G.L. c. 32, § 26(3), which required the involuntary discharge of plaintiff Murgia from the State Police force, although he was physically qualified, simply because he had reached age 50. The first question is whether all issues now presented are properly subject to resolution by three judges, or whether some are for the single judge alone. The parties have sought the former course, and since all three judges are in agreement on the

merits, we see no basis for complaint here whether our decision to sit jointly is legally correct or not.[1]

A few comments are in order with respect to what we are not including in our judgment. Plaintiff asks that we require that his reappointment be to the position of Deputy Superintendent, a position recently created by the Massachusetts legislature, possibly on account of our earlier decision. We decline to do so. Plaintiff was retired with the rank of Lt. Colonel, and it is to this position that he should be restored. The fact that there was only one officer with a higher rank at the time of his dismissal does not guarantee that if he had not been dismissed he would have been entitled to the new superior position. In any event, we do not propose to organize the State Police. If, by some seemingly remote possibility plaintiff hereafter is able to show, in connection with his reinstatement, discriminiation amounting to a failure fully to comply with our judgment, that would be another matter.

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[1] We recognize, of course, that jurisdiction cannot be conferred by consent or waiver. *Americans United for Separation of Church and State* v. *Paire*, 1 Cir., 1973, 475 F.2d 462, 464. Given our unanimity, however, the question of three judges does not affect the outcome, and will come into focus only in case of an appeal, viz., whether it should lie wholly to the Supreme Court, or to the Court of Appeals as well on the issue of relief here considered. *See Socialist Workers Party* v. *Rockefeller*, S.D.N.Y., 1970, 314 F.Supp. 984, 996-97, *aff'd*, 400 U.S. 806, *appeal dismissed*, 400 U.S. 962; *Swift & Co.* v. *Wickham*, S.D.N.Y., 1964, 230 F.Supp. 398, *aff'd*, 2 Cir., 364 F.2d 241, *cert. denied*, 385 U.S. 1036. The question of relief at issue seems sufficiently bound up with the equitable remedy sought by plaintiff to be appropriate for consideration by three judges. *See Baltimore & Ohio R.R. Co.* v. *United States*, 1929, 279 U.S. 781, 785; *Department of Employment* v. *United States*, 385 U.S. 355, 357, *aff'g* 263 F.Supp. 581. At the least, the decision to retain three-judge jurisdiction may be within our discretion, *see Jenkins* v. *McKeithen*, E.D. La., 1968, 286 F.Supp. 537, 542, *rev'd on other grounds*, 395 U.S. 411, and, if so, we exercise that discretion in favor of retention.

Next, plaintiff asks us to include an order for back pay, which he describes as "restitution of compensation withheld." The parties, inter sese, have made various calculations and adjustments, and have stipulated to the amount, but defendants, citing the Eleventh Amendment, and *Edelman* v. *Jordan*, 1974, 415 U.S. 651, contest our right to make any award.

In *Edelman* the Court affirmed a judgment declaring unconstitutional certain state practices barring plaintiffs from receiving welfare benefits, but reversed a money judgment awarding retroactive benefits of which plaintiffs had been deprived. The Court held that although such payment was denominated equitable restitution and in substance might be so considered, this did not serve to avoid the Eleventh Amendment's strictures. Plaintiff's attempted distinctions are not persuasive. First, plaintiff says that his discharge was after the institution of the action, so that there would be no retroactive effect on the state treasury because the state was on notice when it failed to keep the money. This argument proves too much. If defendants retained plaintiff in his position they would have violated the statute, as yet not held unconstitutional. If they discharged him they could not retain the funds, because they had to hire a replacement.

Next, plaintiff argues that since the amount of the payment here is not substantial, perhaps defendants will, or should pay it in their individual capacities. They support this contention with the claim that defendants' action was not "simple good faith application of the provisions of the statute" because they knew of the pendency of the action. Our previous answer applies here, if anything more strongly. *Cf. Class* v. *Norton*, 2 Cir., 10/10/74, ... F.2d .... The balance of plaintiff's argument, dealing with what he

terms equitable restitution, is irrelevant to the Eleventh Amendment.

Next, plaintiff asks for costs, to include counsel fees. Although *Edelman* did not consider the question, we think it offers guidance. *Edelman* reaffirms the langstanding proposition that the major objective of the Eleventh Amendment is to protect state treasuries against judicial levy. 415 U.S. at 662-65. *See Jordan* v. *Gilligan,* 6 Cir., 1974, 500 F.2d 701, 706; The Supreme Court, 1973 Term, 1974, 88 Harv.L.Rev. 13, 246-47. In this light we find unpersuasive attempts to permit monetary assessments, as against Eleventh Amendment claims, simply because they may be characterized as remedial or administrative rather than compensatory. *See Gates* v. *Collier,* 5 Cir., 1973, 489 F.2d 298, 302. In either case the treasury is taxed. *Cf. Gilligan,* ante, 500 F.2d at 708. Indeed, *Edelman* itself exploded such distinctions, assuming arguendo that the restitution there sought might be termed "equitable," 415 U.S. at 665, 669, while barring such relief for its fiscal interference. *Id.* at 668-69. *See also Ford Motor Co.* v. *Department of Treasury,* 1945, 323 U.S. 459, 462-64.

It may well be that *Fairmont Creamery Co.* v. *Minnesota,* 1927, 275 U.S. 70, 74, imposing ordinary court costs against a state as one of the "incidents of the hearing . . . which attach to the regular jurisdiction" of the federal court, 275 U.S. at 77, survives the proscription of *Edelman. See Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher,* 1 Cir., (11/8/74), ... F.2d .... However, we regard the imposition of attorneys fees to be in a different category. Absent statutory or contractual authorization, such awards are made for a variety of reasons. *See Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* 1 Cir., 1973,

484 F.2d 1331, 1332-34. They punish bad faith or frivolous postures. *Id.* at 1333; *Beecher,* ante, slip op. at 3; *Class,* ante, slip op. at 92. They spread the cost of litigation among classes benefiting from the judgment. *Hall* v. *Cole,* 1973, 412 U.S. 1, 5-7; *Mills* v. *Electric Auto-Lite Co.,* 1970, 396 U.S. 375, 392-95. They reward, and hence encourage, litigants who secure decisions of public as well as private interest. *Newman* v. *Piggie Park Enterprises, Inc.,* 1968, 390 U.S. 400, 402 (per curiam); *National Resources Defense Council, Inc.,* ante, 484 F.2d at 1333. Each of these objectives reflects independent policy considerations unrelated to the enforcement of injunctions, and in no sense can be termed "integral" to such relief.

The area possibly closest to integral costs is where a party has had special burdens in respect to conduct of the litigation itself. In the present case plaintiff's course has not been made more onerous by any harassment or bad faith. Nor was he in the position of representing a class, either in fact, or in the background.[2] We deny plaintiff's request for an award of counsel fees both as a matter of law, and as a matter of discretion.

As to regular court costs, we adopt, without further consideration, the view of the Court of Appeals for this Circuit in *Beecher,* ante, and hold that defendants are chargeable.

/s/ Bailey Aldrich
U.S. Senior Circuit Judge
/s/ Frank H. Freedman
U.S. District Judge
/s/ Joseph L. Tauro
U.S. District Judge

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[2] Only one additional individual, and a latecomer at that, has sought representation as a party plaintiff. So far as a class is concerned, the State Police Association of Massachusetts, as amicus, has sought to disassociate itself from plaintiff's position.

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 72-2083-T — CIVIL ACTION

ROBERT D. MURGIA,
Plaintiff

v.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT, ET AL
Defendants

ORDER

TAURO D.J.
December 12, 1974

In accordance with our opinion of May 31, 1974, Mass. Gen. Laws c. 32 § 26(3) is declared unconstitutional and void and the defendants are enjoined from further enforcement of the section. It is further ordered that the plaintiff be reinstated to the position of Lt. Colonel in the Uniformed Branch of the Massachusetts State Police. Costs are taxed against defendants.

This order is stayed pending appeal, provided that notice of appeal is filed within thirty (30) days.

/s/ BAILEY ALDRICH
U.S. Senior Circuit Judge
/s/ FRANK H. FREEDMAN
U.S. District Judge
/s/ JOSEPH L. TAURO
U.S. District Judge

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

No. 72-2083-T — CIVIL ACTION

ROBERT D. MURGIA,
Plaintiff

v.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT, ROBERT Q. CRANE,
ANGELO AMATO, and J. JOSEPH MALONEY, JR.,
as They Are Members of the
COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT and
JAMES W. CALLANAN, Executive Secretary of the
COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT,
Defendants

NOTICE OF APPEAL

Notice is hereby given that the Members and Executive Secretary of the Commonwealth of Massachusetts Board of Retirement and the Commissioner of Public Safety of the Commonwealth of Massachusetts, Defendants in the above-entitled action, hereby appeal to the Supreme Court of the United States from the Order enjoining the Defendants

from further enforcement of Mass. G.L. c. 32, § 26(3) entered by a three-judge court in this action on the 12th day of December, 1974.

By their attorney,
/s/ TERENCE P. O'MALLEY
Assistant Attorney General

December 23, 1974

CERTIFICATE OF SERVICE

I, Terence P. O'Malley, a member of the bar of the United States District Court for the District of Massachusetts, hereby certify that I have mailed a copy of the within Notice of Appeal to Robert L. Wise, Es., Wise and Wise, 79 Milk Street, Boston, Mass. 02109 and Robert D. City, Esq., Moulton, Looney, Mazzone, Fall & Markham, 15 Broad Street, Boston, Mass. 02109 on this 23rd day of December, 1974.

/s/ TERENCE P. O'MALLEY